

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

November 14, 2001

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

IS THE CITY COUNCIL REQUIRED TO PUT A CHARTER AMENDMENT INITIATIVE
THAT RECEIVED FIFTEEN PERCENT OF QUALIFIED VOTERS' SIGNATURES ON THE
BALLOT?

INTRODUCTION

On June 29, 2000, proponents of "The San Diego Taxpayer Protection Act of 2000" filed an initiative petition with the City Clerk. This petition requests submission of a proposed amendment to the San Diego Charter regarding general taxes to the City's voters [General Tax Initiative]. The City Clerk certified that the initiative petition contained the requisite number of signatures for submission to the voters. By Resolution R-293814 adopted on September 18, 2000, the City Council accepted the Clerk's certification, declared its intention to place this matter before the voters, and directed the City Attorney to prepare an ordinance to place this matter on the ballot.

Pursuant to the Council's direction in that resolution, the City Attorney prepared the ordinance to place this matter on the ballot for the March 5, 2002, municipal election. The ordinance was scheduled for discussion and adoption at the City Council meeting of November 5, 2001. During discussion of the item, a Council member asked whether the City Council was legally obliged to vote for the ordinance and, if so, whether Council members could be held liable for failure to do so. These questions were referred to the City Attorney, who was requested to report back to Council at their meeting on November 19, 2001.

QUESTIONS PRESENTED

- (1) Is the City Council required to submit an initiative to City voters to amend the City Charter when the initiative has satisfied all legal requirements for placement on the ballot?
- (2) If the answer to question one is "yes," what is the consequence of failing to place the initiative on the ballot and may costs or damages be assessed for failure to do so?

SHORT ANSWERS

- (1) Yes. Once an initiative petition to amend the City Charter has received the requisite number of signatures, state law requires the City to submit that initiative to a vote of the people. Using election procedures set forth in the Municipal Code, the City Council places an initiative on the ballot by ordinance.
- (2) If a City Council failed to submit a qualified initiative to the voters, a court could issue a writ of mandate compelling the Council to do so. Through both California state statutory provisions and the equitable powers of the California state courts, a prevailing party in a writ of mandate action may be awarded damages, costs, and attorney's fees. Cal. Civ. Proc. Code §§ 1021.5, 1095.

ANALYSIS

I

Council's Duty to Place Qualified Initiative on the Ballot

The San Diego City Charter states that it may be amended using the procedures described in the California Constitution. San Diego Charter § 223. The California Constitution provides that amendment of a city charter may be proposed by initiative. Cal. Const. art. 11, § 3(b). Because California courts have determined that adoptions of and amendments to city charters are matters of statewide concern, the charter amendment process is governed by the California Elections Code. *District Election Etc. Committee v. O'Connor*, 78 Cal. App. 3d 261, 271-274 (1978). *See also* 1989 City Attorney MOL 30.

Sections 9255-9269 of the California Elections Code govern adoption of and amendments to city charters. Section 9255(a)(3) *requires* that an amendment to a charter proposed by a petition signed by fifteen percent of the registered voters of a city be submitted to the voters.

To implement this state requirement, this City relies on its own Election Code set forth in the San Diego Municipal Code [SDMC]. Essentially, the City uses the mechanism of an

ordinance adopted by City Council to ensure that initiatives that are required by law to be placed on the ballot are in fact submitted to the voters. SDMC § 27.1035.¹

The procedural steps used to implement the use of the initiative in this City are contained in SDMC sections 27.1001- 27.1051. Once an initiative petition containing the requisite number of signatures is presented to the Council, the Council has a limited time period in which to take action on the petition. When it takes action on a petition, the Council is required to:

(a) adopt a resolution of intention to submit the matter to the *voters* at a *special election*; and

(b) direct the City Attorney to prepare an ordinance calling a *special election* to place the matter on the ballot.

SDMC § 27.1035 (Emphasis in original). The ordinance that the City Attorney prepares pursuant to this Council direction is presented later to Council for adoption.

In the present instance, the City Clerk has certified that the General Tax Initiative received the requisite number of signatures to require submission of the proposition to the voters. As required by California Elections Code section 9255(a)(3) and by SDMC section 27.1035, on September 18, 2000, the City Council took one of the actions necessary to place the General Tax Initiative on the ballot; namely, the Council adopted the resolution of intention to place the proposed charter amendment initiative on the ballot. At the same time, the City Council directed the City Attorney to draft the necessary ordinance to place the matter on the ballot at the next available municipal election.

The ordinance is now before the City Council for adoption. Even though members of the City Council do not necessarily agree with the policy behind this General Tax Initiative, the City Council has the duty to meet the requirements of California Elections Code section 9255(a)(3) by adopting the ordinance placing the General Tax Initiative on the March 5, 2002, ballot.

¹Under state law, a city may place a proposition on the ballot either by ordinance or by resolution. Cal. Elec. Code § 10201. Adoption of both a resolution and an ordinance require action by the legislative body.

II

Statutory Writ of Mandate May be Used to Compel Council's Adoption of the Ordinance and Placement of the General Tax Initiative on the Ballot

In California, a writ of mandate may be used to compel an official or body to act when the official or body has a clear duty to act and when no discretion is to be exercised in the completion of the official's duty. Cal. Civ. Proc. Code §§ 1085, 1086; *Plum v. City of Healdsburg*, 237 Cal. App. 2d 308, 314-15 (1965).

"The law is clear: A local government is not empowered to refuse to place a duly certified initiative on the ballot." *Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141, 149 (1993). "The courts have uniformly condemned local governments when these legislative bodies have refused to place duly qualified initiatives on the ballot. [Citations omitted]." *Id.* at 148.

While it is true that a governmental body that believes that an initiative measure is unlawful and should not be presented to the voters may file a petition for writ of mandate and seek a court order to remove the initiative measure from the ballot, the governmental body "may not unilaterally decide to prevent a duly qualified initiative from being presented to the electorate." *Id.* at 149.

In the present instance, California Elections Code section 9255(a)(3) places an express, ministerial duty on the City to place the General Tax Initiative on the ballot. In the present circumstances, adoption of the ordinance is a ministerial duty. A court of law would probably issue a writ of mandate to compel adoption of the ordinance and placement of the General Tax Initiative on the ballot.

III

Liability for Failure to Perform Ministerial Act

In addition to the issuance of a writ commanding the public official or body to perform its ministerial duty, California courts are empowered to award damages, including costs, and attorney fees to the successful petitioner for a writ of mandate.

Damages, including costs, are permitted to a successful party for a writ of mandate. Cal. Civ. Proc. Code § 1095. Costs include those expenses the parties incur in prosecuting or defending actions. *Pezel v. Yerex*, 56 Cal. App. 304, 311 (1922).

In addition to their broad equitable powers to award attorney's fees,² by statute California courts may award attorney's fees when the legal action undertaken has resulted in the enforcement of an important public right affecting the public interest if three conditions are met. First, a court must find that the lawsuit has conferred a significant benefit on the general public or a large class of persons. Second, the financial burden of private enforcement makes the award appropriate. Third, in the interest of justice, the attorney's fees should not be paid out of financial recovery, if any. Cal. Civ. Proc. Code § 1021.5.³ This statutory provision was enacted to provide attorney's fees when a litigant was acting as a "private attorney general." *County of Inyo v. City of Los Angeles*, 78 Cal. App. 3d 82, 88-89 (1978).

CONCLUSION

The General Tax Initiative, which proposes to amend the San Diego City Charter, received fifteen percent of qualified registered voters' signatures. By state law, the City is required to place this initiative on the ballot for voters' approval or rejection. The City Council has a ministerial duty to adopt the ordinance placing this initiative on the ballot at the March 5, 2002, municipal election. If the City Council fails to take that action, a court could issue a writ of mandate to compel the Council to do so. If a writ of mandate is issued, the court could award damages, including costs, and attorney's fees against the City.

Respectfully submitted,

/ S /

CASEY GWINN
City Attorney

CCM:vl
RC-2001-31

² See generally *Serrano v. Priest*, 20 Cal.3d 25, 35-48 (1977); *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal.3d 917, 930 (1979).

³ Note that there is no "good faith" exception to an award of attorney's fees under section 1021.5. *Schmid v. Lovette*, 154 Cal. App.3d 466, 475 (1984).